Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Emergency Declaratory	)	CC Docket 94-102
Ruling by California State 9-1-1	)	
Program Manager	)	

REPLY COMMENTS OF THE NATIONAL EMERGENCY NUMBER ASSOCIATION

The National Emergency Number Association ("NENA") hereby responds to the comments of others in the captioned matter, opened by Public Notice DA 98-1504, July 30, 1998. Although many of the industry commenters express their central concern, "immunity from liability," as if they were seeking absolute protection, NENA accepts for these purposes the assurance of Nextel (Comments, 3, n.3): "Carriers are not seeking liability protection for intentional acts or gross negligence on their part."

Moreover, it is sometimes difficult to ascertain whether carriers want both a statutory, contractual or tariffed means of limiting their liability and payment of the costs of insurance to indemnify them to the extent they are found liable. Again, NENA accepts as better reasoned the view that one or the other safeguard is needed, not both.

In its Comments in this matter, and in earlier responses to petitions for further reconsideration by CTIA and BellSouth in the docket, NENA has acknowledged the legitimacy of wireless carrier desires for some effective means to limit their liability. We pointed particularly to the pending proposals for the filing of informational tariffs. Moreover, a NENA officer, Bill Hinkle, wrote supportively as follows to the co-sponsor of California

state legislation -- mentioned by several commenters here -- that would have limited carrier liability and permitted routing of cellular calls to other than CHP destinations:

> While immunity from liability is not a formal part of the FCC mandate, it is understandably an important issue to the wireless service providers. . . . [States] are being encouraged to adopt qualified immunity provisions to ensure that wireless carriers are not held liable when a wireless call is mishandled except in cases of gross negligence.[1]

Is it possible to support carrier limitation of liability without making it a precondition for Phase I service? NENA continues to think so.

Despite claims to the contrary,
California appears to sanction
several means of limiting liability.

In 20 sets of comments, only one (Omnipoint, 3, n.2) mentions, and then only in passing, a recent California case upholding a cellular carrier's tariffed limitation of liability to $5,000, even in a case of gross negligence.[2] The state's Public Utility Commission, according to the California appeals court

> is specifically empowered to require a public utility to file tariff schedules containing the utility's rates, charges, classifications and conditions affecting service.

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[1] Attachment to the Comments of Cellular Carriers Association of California ("CCAC"), August 14, 1998.

[2] Los Angeles Cellular Telephone Company v. The Superior Court of Los Angeles County, 1998 Cal. App. LEXIS 664, 76 Cal.Rptr. 2d 894 (Cal. 1998). Trial on the merits as to negligence is pending. This decision was a preliminary summary adjudication on the validity of the liability limitation in the event of a finding of negligence.

The court acknowledged that a 1993 amendment to the Communications Act, 47 U.S.C.§332(c)(3), had preempted state regulation of cellular service entry and rates since LA Cellular's initial tariff filing in 1989, but had reserved to non-federal authority "the other terms and conditions of commercial mobile services." LEXIS 664 at 4-5. Thus, although the events in the cited case took place before the federal preemption of rate regulation became effective, the court's upholding of tariffed liability limitation remains viable today because it is based on surviving state authority to set other terms and conditions of commercial mobile services.

U.S. Cellular Corporation ("USCC," Comments, 4) says it "is advised by California counsel that the state law does not favor contracts which seek to exempt one party from liability." There is no hint of such disfavor in the appeals court's order, which discusses with equanimity a liability limitation in a purchase agreement but declines to apply the safeguard because the agreement proffered in evidence by the carrier was unsigned. LEXIS 664 at n.4. The Cellular Carriers Association of California ("CCAC") claims (Comments, 3) that "a growing number of wireless transactions are paperless or electronic," thus affording "no opportunity to contractually limit liability." Assuming (without accepting) that a paperless transaction precludes a liability-limiting clause, the carrier remains free to choose the medium of the transaction. If he needs paper to protect himself, he should use paper.

On this record, then, it would seem that commercial mobile service carriers operating in California are not bereft, even absent legislation, of means to limit their liability for claims against their operations. Having said this, NENA does not object to making those means more sure and clear, whether it be state legislation, FCC permission to file informational tariffs,

or some other acceptable vehicle.[3] We repeat, however, that implementation of Phase I caller ID and location requirements need not await the perfection of indemnification. One reason is that the record evidence of carrier risk is slim to none.

> It is not clear that "multimillion dollar liability judgments" are in the offing for wireless carriers in California or elsewhere.

USCC conjures (Comments, 5) "the threat of multimillion dollar liability judgments if a particular emergency call, for whatever reason, from foliage to rain attenuation to a system 'dead spot,' does not get through." While the prose of the other carrier commenters is not quite so purple, they appear to agree that their risk of what would amount to *per se* liability is quite high.[4]

Such a level of risk is not evident in Docket 94-102 thus far. To the contrary, as discussed above, the state at bar here, California, has just been the source of an appellate ruling upholding tariffed limitation of liability to $5,000 even in the event of gross negligence. Does this mean that carriers need not worry? No. Does it suggest, however, that Phase I can go forward in the interim? Yes, unless carriers are able to document their fears.

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[3] An FCC-ordered national limitation of liability is not acceptable because it is likely to breed resistance and challenge from the states, while public funding of carrier insurance premiums would be, in the words of the California 9-1-1 Program, an "actuarial nightmare." Reply, August 24, 1998, 3, n.3.

[4] XYPOINT (Comments, 3) counts 31 states with liability legislation, only one of which (Delaware) makes carriers "expressly liable." USCC's expectation of carriers having to defend against rain or foliage attenuation seems a mite far-fetched.

Tariffed limitation of liability is the simplest interim solution.

California appears to have maintained the filing of tariffs for cellular service, insofar as this does not run afoul of federal supremacy in matters of entry and rates. Other states without wireless 9-1-1 liability legislation may, nevertheless, allow (or at least not disallow) such tariffing. Even if this vehicle is unavailable at the state level, the FCC could accept informational submissions as proposed in the Petitions of CTIA and BellSouth in this docket dated February 17, 1998. NENA said in Comments of March 18, 1998:

> We do not object to Commission consideration of wireless carrier filing of informational tariffs or contracts containing legally-sustainable limitations. We strongly object, however, to BellSouth's proposal that wireless carriers not be required to implement E9-1-1 in any state that does not limit wireless carrier liability for the service.

A number of commenters have seized on this solution, at least until it is supplanted by state legislation.[5] NENA repeats that this is a simple and workable solution so long as the filed tariffs or contracts do not contradict state law.[6]

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5 Bell Atlantic Mobile, 2, 3; TruePosition, 3; BellSouth, 4; CTIA, 4; Rural Telecommunications Group, 1-2.

6 In a state where wireless carrier liability has not been addressed at all, forbidding carriers the "self-help" of FCC tariffs would appear to constitute a preemptible obstacle to federal purposes.

In the matter of selective routing,
carriers should not be caught
between two sovereigns.

Most industry comments acknowledge that designation of appropriate PSAPs to receive wireless 9-1-1 calls is a matter of choice for the pertinent 9-1-1 Authority. What happens when two 9-1-1 Authorities order different routings? Two examples arise on the record here. In California, the 9-1-1 Program and the California Highway Patrol ("CHP") do not disagree, but a state law disallowing selective routing according to caller location -- predating caller location capability -- remains on the books. In New York State (Nextel Comments, 6), a county and the state police are at odds over routing.

Carriers require and deserve clarity on wireless 9-1-1 call routing. The preferred means of achieving certainty is for non-federal authorities to resolve their differences promptly themselves. If they cannot, the FCC should make itself available, either in a mediating capacity or as the source of potential preemption of state or local laws standing as obstacles to federal purposes.

CONCLUSION

For the reasons discussed, the FCC should respond to the petition of the California 9-1-1 Program by finding that:

- Limitation of carrier liability is not a precondition to Phase I wireless caller identification and location;

- But the issue is of sufficient concern to warrant permitting carriers to file informational tariffs or contracts for the purpose;

• As a simpler solution than public funding of insurance premiums for carrier indemnification, which in any event were never intended to be recoverable costs of E9-1-1 implementation.

• To the extent carriers are given conflicting routing instructions by non-federal 9-1-1 Authorities, the Commission stands ready to mediate the dispute or resolve it by adjudication.

Respectfully submitted,

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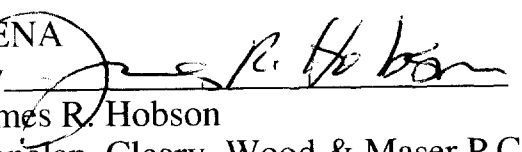
By 
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 24th day of August, 1998, served copies of the foregoing *Reply Comments of the National Emergency Number Association*, by first-class mail, postage prepaid, on all parties of record in the above captioned proceeding.

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